Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

No. 80-2088

LEODA WREN, et al.,

Petitioners,

v.

NOLAN JONES, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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July, 1981

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QUESTIONS PRESENTED

Although the petition presents eight questions and subquestions, it argues only two points in its Reasons for Granting the Writ, obviously because the other questions were not thought certworthy. We shall limit our reply to the questions argued, which can only be understood in the context of the following critical undisputed facts.

In 1973, an Illinois court ordered reinstated 29 Democratic road and other workers who, with all other employees in the same categories, had been replaced by Republicans when the Illinois governorship changed hands. At that time, the legislature was curtailing the appropriations for the state agencies involved. In order to make room for the Democrats ordered reinstated, state officials (defendant-respondents here) selected for layoff, where they could be identified, the employees who had replaced those particular Democrats. Since no Democrats remained in the affected classes, all of the persons laid off were Republicans (plaintiff-petitioners here). Petitioners are contending that this was a political firing in violation of § 1983.

In the light of these facts, the questions presented are:

1. (a) Whether plaintiff-petitioners have sustained their burden of proving they were laid off for political reasons in violation of the First and Fourteenth Amendments and § 1983.

   (b) If so, whether defendant-respondents have established that plaintiffs would have been laid off in any event.*

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*If it should be found that defendants violated § 1983, respondents will present the question whether plaintiff's claim for damages is barred by the doctrine of qualified immunity, since the evidence undoubtedly establishes that defendants were acting without malice and without knowledge that they were violating a clearly established constitutional right.

2. The petition asserts that a number of other incidents justify the inference of political motivation drawn by the District Court, but it fails to mention much of the evidence which shows that those inferences are unreasonable. The question presented is whether the evidence as to those incidents was sufficient to support the trial court's finding that petitioners were laid off for political reasons in violation of § 1983.

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BRIEF IN OPPOSITION

STATEMENT OF FACTS*

In accordance with the then prevalent practice of both political parties, the new Republican administration in Illinois in 1969 removed from the classified civil service the positions of highway workers** who had been appointed and then covered in by the preceding Democratic administration. All were replaced by Republicans. Pet. App. 2a. In 1973, in a suit instituted by 30 of the removed Democrats (*Bradley*

*Citations herein are to Petitioner's Appendix ("Pet. App. ....."), Appendix of Defendants-Appellants ("A. ....."), Appendix of Plaintiffs-Appellees-Cross-Appellants ("CA ....."), and the page numbers by date of the trial transcript ("trans.") and exhibits.

**Although one of the 26 plaintiffs in this case was employed by the Department of Mental Health, we shall for convenience follow the petition in referring to the plaintiffs generally as highway workers.

v. *Cellini*, No. 2795-69 (Cir. Ct., Sangamon County), the Illinois Circuit Court held that the termination of the plaintiffs had been in violation of Illinois law, and ordered the officials of the state agencies involved within 30 days

> "to restore and return each of the Plaintiffs to the position and title held by such Plaintiff on the date of his discharge from said position or to discharge each Plaintiff in accordance with The Personnel Code and Rules of the Department of Personnel of Illinois." A. 346.

At that time, the state agencies involved were laying off a number of employees because of reduced appropriations. A. 77, 146. Accordingly, all the state officials called upon to implement the *Bradley* decision—who are the defendants in this case—assumed that employees would have to be laid off to make room for the persons ordered reinstated.

After some uncertainty as to how to reconcile the *Bradley* order with the Illinois civil service rules, it was finally decided that it would be most consistent with the Circuit Court's order to lay off the incumbents (or their successors) who had directly replaced the *Bradley* plaintiffs. A. 62a. All of the employees in the class had the same seniority, since all had been covered into the classified service on the same day. Pet. App. 17a, A. 62a.* "In four instances, where the

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*Seniority rights date from coverage into the Civil Service as a provisional employee, not from earlier uncovered employment. A. 125-126, 368-369 (Rule 2-570). The assertion in the petition (p. 21) that Rhoads admitted disregarding the seniority of petitioners Peeler and Johnson with "no justification" refers to Rhoads' answering "Not that I recall, no," to a leading question as to whether there was justification for laying them off. This answer overlooked the clear meaning of "seniority" under the personnel rules as running from the date of coverage of one's position into the civil service. This was fully explained in the testimony of Stephen Blakeman, who was in charge of verifying seniority for the Illinois Department of Personnel (IDOP). A. 125-26.

position could not be identified precisely, persons were laid off on a random basis from the returning *Bradley* plaintiffs' team section and class, with consideration given to performance." Pet. App. 5a.

Twenty-six of the persons laid off are the plaintiff-petitioners in this case. All were Republicans. Even though by then a new Democratic administration was in office, no Democrats remained in the classes from which the *Bradley* plaintiffs had been removed.

The above method of selecting the persons to be laid off was originally suggested by Robert Rhoads, the Chief Field Officer of IDOP then assigned to the Illinois Department of Transportation (IDOT), a career civil servant. A. 62a, 87. A number of other officials were consulted, including lawyers, and all concurred. A. 94, 187, 194. Some of these persons were in the civil service and some, including Brian Hannigan, who had a Democratic political background, were not.

None of the above facts are disputed. There was no direct evidence that plaintiffs had been selected for layoff for political reasons. See Pet. App. 33a. The testimony of all the witnesses with knowledge of what occurred was to the contrary.

The trial court nevertheless found that the layoffs were politically motivated and therefore in violation of § 1983. Principal reliance was placed on Hannigan's political background in Governor Walker's successful campaign for election. As to this the Court of Appeals found (Pet. App. 18a):

> "At this point, we should comment on the district court's heavy reliance on the history of patronage in Illinois politics. Although historical background is a proper factor in determining present motivation, *e.g., Arlington Heights, supra,* at 267, we believe that too great an emphasis was placed on this factor, and we are not persuaded that the political maneuverings of previous administrations, and even previous maneuverings of some

of the Wren defendants, can be said to be the reason for the personnel actions here contested."

The District Court referred to a number of other incidents as circumstancial evidence that the layoffs were politically motivated, even though there were no persons other than Republicans who could have been laid off. The petition contends that these and other incidents showed that the Court of Appeals erred in finding the District Court's conclusion clearly erroneous. Many of the incidents referred to in the petition (pp. 21-23) on their face concern alleged violations of state employment rules or policies, not of the United States Constitution, and we shall not take the time to deal with them here. As to those which the petition emphasizes and which the District Court relied on, the facts are as follows:

a. It is asserted that five of the plaintiffs here were not subsequently reinstated when five of the *Bradley* plaintiffs left their jobs. At the beginning, when two Bradley plaintiffs (Frank Davis in IDOT and Carl Eubanks in the Department of Mental Health) had notified the state officers that they would be physically unable to return to work, their replacements were not laid off. Pet. App. 37a., A. 56s-t, 310, 337, CA 637.* Subsequently, two positions which became vacant in the team sections to which the *Bradley* plaintiffs had returned were filled by Republicans, and one by a Democrat.**

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*The petition (p. 21) refers to the laying off of petitioner Caldwell. His predecessor reported to the IDOT District Office and completed processing his personnel papers, but he later did not show up for work, even though he apparently had given no notice to that effect. CA 637, 667A. As a result, Caldwell was laid off, and then was not reinstated pursuant to the policy of not adding unnecessarily to the work force.

**Harper, one of the plaintiffs, and Fitzpatrick, who were both subsequently reinstated, were Republicans. A. 561, 573. West, a Democrat, was employed in 1974, but not to the position, county or team section of Lovellette or any other of the plaintiffs. A. 56g ¶ 29, Trans. 4/26/77, pp. 151-152. Lovellette would not have been entitled to transfer to work in a different county unless he so requested, which he admitted he did not. *Id.* at 28.

Except for the latter, the work force remained Republican apart from the reinstated *Bradley* plaintiffs. The other vacant positions were not filled at all in response to the effort to live within the reduced appropriations. A. 115a.

b. The petition asserts (p. 20) that five of the *Bradley* plaintiffs were thought to be physically incapable of performing their work. Preliminary reports did so state. But the petition fails to point out that three of the five persons in question were subsequently found by an examining physician to be "fairly capable" of arduous physical exertion and that the other two were found "capable" of performing such duties. A. 403, 405, 407, 409, 411. Each of these five persons desired reinstatement and did return to work on a full-time basis. A. 238i-295.*

c. Although the Department of Transportation had raised a question as to the vision of five of the other *Bradley* plaintiffs and requested them to submit a report from a "vision specialist of their own choosing" (A. 402, 413-416), there is no evidence that any of them had an uncorrectable vision problem or that he was unable to perform his duties satisfactorily. The Department's policy permitted an employee to continue working despite visual defects "if he is performing his duties satisfactorily." A. 296. The only one of these persons to testify stated that he had no trouble seeing. A. 202.

d. The petition stresses the hiring of 32 temporary summer laborers at the time the layoffs in question were made. In 1973, as in prior years, the Department of Transportation had a statewide program of hiring students for a maximum of two to three months each summer as summer junior laborers. A. 56f, j, m, o. These temporary employees were not covered by civil service, received substantially less pay than had the plaintiffs, and were obviously not in the same

*Robert Rhoads testified that he advised District 9 Maintenance Chief Carl DeWitt that if DeWitt thought any of these five should be discharged to send papers to Rhoads for processing. District 9 never submitted discharge papers for any of the five. Trans. 11/21/77, p. 191; 4/26/77, p. 143; A. 96a, 97.

classification as the plaintiffs. A. 112, 172. They were prohibited by IDOT policy from engaging in activities requiring permanent employees. A. 238f, g. Civil service employees were permitted to accept a voluntary reduction to a lower class of work if they requested it,* but none of the petitioners had requested transfer to these temporary summer positions.

The District Court stated that layoffs were customarily based on seniority, and that the failure to rely on seniority here "can only be construed as an attempt to return to an earlier time" when politics controlled. Pet. App., p. 36a. This disregarded the evidence that all of the incumbent employees had the same seniority as defined by the Personnel Code (see p. 2, *supra*), and that all were Republicans. Pet. App. 2a.

The District Court "inferred that defendants intended to lay off a number of current employees equal to the number of *Bradley* plaintiffs without respect to whether these plaintiffs all returned to work or not." Pet. App., pp. 36a-37a. But the court then conceded that this was not true, since no one was laid off in the place of the one *Bradley* plaintiff who had notified IDOT that he was physically unable to work. Pet. App., p. 37a.

The District Court ordered the plaintiffs reinstated,** and held that Rhoads and Hannigan were liable in damages,*** because they "should have known that the layoffs were politically motivated" (Pet. App. 44a-45a). Even though the court found that they had no "malicious intent" (*id.* at 43a), and that their misconduct was not "intentional, will-

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*A written request for such voluntary reductions was required by Rule 2-530. A. 367.

**They had been restored to their positions *pendente lite* in 1977 (CA 744) and continue to be employed in these positions.

***The damages, costs and attorneys' fees awarded by the District Court amounted to approximately $470,000.

ful or wanton," it held that they could not "establish any basis for qualified immunity" (*id.* at 45a).

The Court of Appeals, finding the judgment clearly erroneous, reversed.

REASONS FOR DENYING THE WRIT

As the Court of Appeals pointed out, this case is "unique". Pet. App. 10a. No case has come close to holding or even intimating that § 1983 or the First Amendment is violated by laying off employees who are affiliated with the political party to which all the workers in the class belong in response to a court order to reinstate their predecessors who had been illegally discharged. Certainly, this Court's decisions on politically motivated discharges (*Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445 U.S. 507 (1980)) do not go that far. Indeed, they imply the contrary. Petitioners did not sustain their burden of showing that layoffs made in such circumstances deprived them of their rights under the First Amendment no matter which of the slightly varying formulations of their burden of proof be applied. Thus, this case does not call for a determination of whether the plaintiffs' membership in the Republican party was "the" or "a" or "a substantial" motivating factor in the defendants' decision to select the plaintiffs for layoff.

The question whether the miscellaneous incidents referred to in the petition were sufficient evidence to support the trial court's finding of political discrimination is one of fact. The Court of Appeals' rejection of this conclusion was, we submit, clearly correct. The issue is, in any event, not of general consequence warranting review by this Court.

1. The petition contends that the court below erroneously declared that the burden on plaintiffs was to prove that political affiliation was "the motivating factor for their discharge."

In its two political discharge cases, this Court reiterated that the plaintiffs had been dismissed "*solely* for [political]

reasons." *Elrod* v. *Burns*, plurality opinion of Justice Brennan, 427 U.S. at 349, 351 (emphasis in this and the following paragraph is supplied). The concurring opinion of Justices Stewart and Blackmun agreed only that a nonpolicy-making, nonconfidential government employee cannot "be discharged or threatened with discharge from a job that he is satisfactorily performing *upon the sole ground* of his political beliefs." *Id.* at 375.

Subsequently, *Branti* v. *Finkel*, 445 U.S. 507 (1980) summarized *Elrod* as holding that a government employee's "beliefs cannot be the *sole* basis for depriving him of continued public employment." *Id.* at 516. The *Branti* opinion then referred approvingly to:

> "the conclusion of both MR. JUSTICE BRENNAN and MR. JUSTICE STEWART that the First Amendment prohibits the dismissal of a public employee *solely* because of his private political beliefs."

The Court concluded (p. 517):

> "To prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged '*solely* for the reason that they were not affiliated or sponsored by the Democratic party.'"

In the related but different line of cases, most of which protected the First Amendment rights of public school teachers to criticize their superiors, the Court has held that the plaintiff's burden was to show that constitutionally protected "conduct was a 'substantial factor'—or, to put in other words, that it was a 'motivating factor' in the Board's decision . . . ." *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977). The footnote cited footnote 21 in *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 270-271 (1977), decided the same day, which stated:

> "Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not

> necessarily have required invalidation of the challenged decision."

The *Mt. Healthy* opinion then added (p. 287):

> "Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."

Most recently, the Court in *Givhan* v. *Western Line Consol. School District*, 439 U.S. 410 (1979), again speaking through Justice Rehnquist who had written the *Mt. Healthy* opinion, emphasized "substantial", rather than "a" or "the" in describing the plaintiff's initial burden of proof, holding that the employee was required to show (439 U.S. at 416) "that his constitutionally protected conduct played a 'substantial' role in the employer's decision not to rehire him." The burden would then be on the employer to prove, "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Ibid.*

After quoting all of the above passages from *Mt. Healthy*, *Arlington Heights* and *Givhan*, the court below spoke in terms of "the motivating factor" in holding that plaintiffs had not met their initial burden. The reiteration of "solely" in *Elrod* and *Branti* would seem to support this for political affiliation cases. There is no reason to believe that the use below of "the" instead of "a" motivating factor was intended to manifest a different standard. We submit, in any event, that the indisputable critical facts here establish that the result in this case would have been the same if "substantial" or "a" had been substituted for "the". Certainly the plaintiffs did not show by a preponderance of the evidence that their

political affiliation was "a substantial" factor in the decision to lay them off. Indeed, it was stipulated that each plaintiff would have remained in the employ of the State "but for" the *Bradley* court's order. A. 51.

The Court of Appeals went further, however, and held that in any event defendants had satisfied their burden under the second part of the *Mt. Healthy* test, finding (Pet. App. 16a-17a)

> "that the defendants have, by a preponderance of the evidence, established that fiscal restraints required a reduction in the affected units equivalent to the number of reinstated in *Bradley* employees, and that fiscal restraints justified the failure to reemploy the plaintiffs during the two year period after their layoffs. Therefore, although the same employees may not have been chosen, for example, had actual hire dates been used rather than the common seniority date of May 1, 1972, the fact would remain that some of the employees in the affected units would have to be laid off.* The fact that all potentially affected employees were Republican means that the Wren plaintiffs' political association was of no consequence, especially in light of the fact that no Democratic employees were hired into similar full-time positions in the same class during the two year period following the dates of the layoffs."

The facts last mentioned demonstrate even more clearly that plaintiffs had not satisfied their burden of proving by a preponderance of the evidence that they had been laid off in substantial part for political reasons.

We submit that no matter how the burden of proof is defined, the decision of the Court of Appeals is correct, and that there is no need for this Court in this case to determine

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*Plaintiffs do not argue that defendants had acted illegally because they did not lay off 26 other Republicans instead of plaintiffs. That would merely have resulted in this lawsuit having a different caption.

that question, or indeed whether the test for political dismissals is the same as for other types of First Amendment claims under § 1983.

2. As stated in the Statement of Facts, the petition purports to summarize various items of circumstantial evidence to show that the District Court was correct in finding that the selection of plaintiffs for layoff was politically motivated. The petition repeatedly refers to the length of the record ("a mass of testimony" (p. 10), "a small mountain of circumstantial evidence" (p. 13)) as demonstrating that the trial court's inference drawn from these incidents could not have been clearly erroneous. Although the evidence as to significant facts was not voluminous, it is true that the record was quite long. But that does not mean that the District Court's conclusions were correct, or even rational. There was little, if any, conflict in the testimony, so that credibility was not an issue.

We submit, as we argued below, that plaintiffs' analysis omits many of the facts of record which demonstrate that the incidents relied on do not prove that the layoffs were politically motivated. This is shown in the Statement of Facts, *supra* pp. 3-6, as to the allegations which come closest to showing political motivation. Many of plaintiffs' 11 items ((g), (h), (i), (j), (k)) present only allegations of violation of departmental practice or state law, not of constitutional rights.

The claim that defendants failed to reinstate some of petitioners when some of the *Bradley* plaintiffs subsequently ceased working does not prove political motivation in the light of the explanation that no one, and particularly no Democrat, was hired in their place; the object was to reduce expenditures. The only persons actually rehired in any plaintiff's class and unit or team section were Republicans Fitzpatrick and Harper. The claim that temporary non-civil service students were given temporary summer jobs

on a political basis does not prove that the layoffs of the plaintiffs were political. The summer students were not filling plaintiffs' jobs or depriving the plaintiffs of work. The same is true as to the hiring of five so-called "ghost" employees in the district to do other types of work for which plaintiffs were not shown to have been qualified. The claim that five of the *Bradley* plaintiffs were at first thought not to be physically qualified collapsed in the light of subsequent medical reports that they were "capable" or "fairly capable" of performing their duties; they did work. And there was no evidence that bad eyesight prevented any of the *Bradley* plaintiffs from working.

The other incidents referred to in the petition (pp. 21-23) were not relied on by the District Court and on their face have no direct relationship to the reasons why petitioners were laid off. It does not seem necessary to discuss them. With respect to a similar effort to rely on circumstantial evidence, the Fifth Circuit's comments in *Tanner* v. *McCall*, 625 F.2d 1183, 1192-1193 (C.A. 5, 1980), are equally applicable here; although "circumstantial evidence can be used to supply inferences of an intent to infringe constitutional rights . . . in this case, the objective manifestations do not supply inferences that rise to the level of proof of a subjective incident of political animus".

CONCLUSION

The "unusual" (Pet. App. 10a) facts of this case are not likely to recur. Whether plaintiffs or defendants satisfied their appropriate burdens of proof depends upon an evaluation of the facts. Whether plaintiffs' burden is defined in terms of proving "a", "the" or "substantial" political motivation, plaintiffs have not sustained it. Furthermore, they would not be entitled to prevail in any event, because, as the Court of Appeals found, the evidence clearly showed that defendants would have reached the same conclusion that

Republicans should be laid off without regard for political affiliation. Moreover, the doctrine of qualified immunity would have barred plaintiffs from recovering damages. Thus the case presents no question worthy of review by this Court.

Respectfully submitted,

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